Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements	)	IB Docket No. 98-148
Regulation of International Accounting Rates	)	CC Docket No. 90-337 (Phase II)
Market Entry and Regulation of Foreign-affiliated Entities	)	IB Docket No. 95-22

REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: April 15, 1999 **Released:** May 6, 1999

By the Commission:

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I. Introduction

1. The Commission has sought to foster an increasingly competitive international telecommunications market by adopting policies that promote the shift away from regulated monopolies and toward private sector competition.[1] This *Order* is a further step in the Commission's policy of removing cumbersome regulations and encouraging competition in the international telecommunications marketplace. In this *Order*, we remove outdated rules that govern the manner in which U.S. international telecommunications carriers relate to foreign carriers that provide service in competitive markets. We find that it is no longer necessary to apply our existing international settlements policy (ISP) to U.S. carrier arrangements with nondominant foreign carriers and with arrangements with all foreign carriers in competitive foreign markets. Indeed, we find that applying our international settlements policy where unnecessary actually inhibits competition in the U.S. market and may be depriving U.S. consumers of benefits of greater competition. The *Order* therefore removes rules that limit the extent to which U.S. carriers compete among themselves in the provision of international telecommunications services. As a result, this action is expected to create greater incentives for U.S. carriers to adopt business strategies that will enable them to obtain low rates to terminate U.S. traffic in foreign markets.

2. The Telecommunications Act of 1996 directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of all regulations issued under the Communications Act that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be "no longer necessary in the public interest."[2] In particular, the Act directs the Commission to determine whether any such regulation is no longer necessary "as the result of meaningful economic competition between providers of such service."[3] Accordingly, the Commission initiated a comprehensive 1998 biennial review to identify regulations that are overly burdensome or no longer serve the public interest.[4] We find, pursuant to Section 11(a)(2) of the Communications Act (Act), that in the specific instances described below, the ISP is no longer necessary in the public interest as a result of meaningful economic competition. As required under Section 11(b), we therefore repeal the ISP, as it is no longer in the public interest.[5]

3. In August 1998, the Commission issued a *Notice of Proposed Rulemaking*, in which it proposed substantial changes in the way it regulates international telecommunications carriers' relations with their foreign counterparts.[6] We proposed in the *Notice* to reform our application of the ISP,

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1 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997) (*Foreign Participation Order*), *petition for recon. pending*.

2 47 U.S.C. § 161 (1998).

3 47 U.S.C. § 161(a)(2).

4 *See* FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review, News Release (Feb. 5, 1998).

5 47 U.S.C. § 11(a)-(b).

6 *1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148 and CC Docket No. 90-337, Notice of Proposed Rulemaking, 13 FCC Rcd 15,320 (1998) (*Notice*).

which governs the settlement payment for the exchange of telecommunications traffic between U.S. and foreign telecommunications carriers. This *Order* adopts most of those proposed changes.

4. The steps we take in this *Order* remove regulatory impediments to increased competition in the international telecommunications marketplace. These steps are a response to the dramatic changes in international telecommunications markets that have occurred in recent years. We expect these changes to promote lower prices and greater innovation in international telecommunications services for U.S. consumers.

5. In the *Notice*, the Commission sought comment on the application of the ISP generally and proposed to make several significant changes. First, we proposed no longer to require U.S. carriers to comply with the ISP in certain circumstances. Specifically, we proposed not to apply the ISP to arrangements: (1) between U.S. carriers and foreign carriers that lack market power in World Trade Organization (WTO) Member countries; and (2) with foreign carriers in WTO Member countries to which U.S. carriers are authorized by the Commission to provide international simple resale (ISR). We also sought comment, in those circumstances where we decline to apply the ISP, whether to require U.S. carriers to file contracts or settlement rate information. Second, we proposed to modify our existing flexibility policy. Third, we sought comment on whether to modify our rules governing ISR as a mechanism for putting increased pressure on international settlement rates. Finally, we sought comment on the application of our existing competitive safeguards and whether, if we do make changes in our ISP, we should modify those safeguards.

6. We conclude, as discussed below, that we should remove the ISP: (1) for settlement arrangements between U.S. carriers and foreign telecommunications carriers that lack market power; and (2) for all settlement arrangements on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are at least 25 percent below the applicable benchmark settlement rate. We also find, as discussed below, that in light of these changes, our flexibility policy is superfluous and therefore remove it. We also clarify our No Special Concessions rule and make minor changes to our filing requirements. We take these steps based on the Commission's objectives of maintaining a regulatory regime that takes into account the current state of telecommunications markets, consistent with the requirements of Section 11 of the Act that we remove rules that are no longer necessary in the public interest as a result of meaningful economic competition.[7] The steps we take in this *Order* also reflect our desire to ensure that our rules are narrowly tailored to apply only in circumstances where their benefits clearly outweigh any harmful effects.

II. Background

7. The Commission has had a long-standing policy of protecting U.S. carriers from the monopoly power wielded by foreign carriers in the international telecommunications market. The international telecommunications market in the United States has had multiple, competing carriers almost since its inception. There has been significant competition in U.S. provision of telex and telegraph service since the 1930s and competition for basic voice service, or International Message Telephone Service (IMTS) since the mid-1980s. On the other hand, until very recently, international telecommunications markets in foreign countries have been dominated by single monopoly operators, usually government owned.

8. The Commission's policies recognize that this competitive differential could have a

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[7] 47 U.S.C. § 11(a)-(b).

significant impact on the prices U.S. consumers pay for international service. A significant component of U.S. carriers' costs of providing international service is the settlement payments they make to foreign carriers to terminate international calls in other countries.[8] In negotiating settlement rates, foreign monopoly carriers could pit competing U.S. carriers against one another, exploiting the fact that U.S. carriers unwilling to pay settlement rates demanded by foreign carriers would lose business on those routes to higher-bidding U.S. competitors, as there are no alternative means of terminating international traffic. This practice, known as "whipsawing," can drive up the cost to U.S. carriers of terminating international traffic in foreign markets, and hence, the prices paid by U.S. consumers.

9. In a series of decisions starting in 1936, the Commission developed its International Settlements Policy (ISP), a policy that, among other things, requires U.S. telecommunications carriers to pay nondiscriminatory rates for the termination of international traffic in foreign countries.[9] Although the ISP initially applied only to international telegraph and telex service, the Commission extended it to voice traffic in 1986 in the *ISP Order*.[10] This policy was developed to prevent foreign monopoly carriers from engaging in "whipsawing," or playing U.S. carriers against each other to the disadvantage of U.S. carriers and U.S. ratepayers.[11] The ISP requires: (1) the equal division of the accounting rate between the U.S. and foreign carrier; (2) nondiscriminatory treatment of U.S. carriers (all U.S. carriers must receive the same accounting rate, with the same effective date); and (3) proportionate return of inbound traffic. As stated in the *ISP Order*, "[t]he policy of uniform settlement rates arose in response to the unique situation in the international telecommunications arena which places single governmental or quasi-governmental entities from other nations in direct negotiation with multiple private U.S. entities for the formation of operating agreements to arrange international services."[12] To ensure compliance with the ISP and other relevant rules, the Commission requires that all accounting rate agreements be filed with the Commission and made public.[13] The International

8 The current international accounting rate system was developed as part of a regulatory tradition in which international telecommunications services were supplied through a bilateral correspondent relationship between national monopoly carriers. An accounting rate is the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. Each carrier's portion of the accounting rate is referred to as the settlement rate. In almost all cases, the settlement rate is equal to one-half the negotiated accounting rate.

9 *See Mackay Radio and Telegraph Company*, Inc., 2 FCC 592 (1936), *aff'd Mackay Radio and Telegraph Co. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company*, 25 FCC 690, 733-34 (1951), *rev'd on other grounds sub nom., RCA Communications, Inc. v. FCC*, 210 F. 2d 694 (D.C. Cir. 1952), *vacated and remanded*, 346 U.S. 86 (1953); *TRT Communications Corp.*, 46 FCC 2d 1042 (1974); *Uniform Settlement Rates on Parallel International Communications Routes*, Docket No. 21265, Memorandum Opinion and Order, 84 FCC 2d 121 (1980) (*USP Order*).

10 *Implementation and Scope of the Uniform Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988). *See also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992); 47 C.F.R. § 43.51(e)(4); 47 C.F.R. § 64.1001 (1998).

11 For a discussion of whipsawing and its harmful effects, see *USP Order*, 84 FCC 2d 121,122, ¶ 4-5.

12 *ISP Order*, 51 Fed. Reg.at 4736, ¶ 3.

13 *See* 47 C.F.R. 64.1001(l)(2) (1998).

Bureau, on delegated authority, may reject a particular agreement if it finds that its terms and conditions do not comply with the ISP and serve the public interest in achieving cost-based accounting rates.[14]

10. Since the Commission first implemented the ISP for voice traffic, the market for international telecommunications services has changed radically. Today, over 30 countries are committed to open and competitive telecommunications markets, and 22 other countries have committed to open their markets in the future as a part of the WTO Agreement on Basic Telecommunications.[15] New entrants are being established in regions throughout the world and are rapidly gaining substantial market share in many markets. For example, in Europe, over 50 new facilities-based carriers have entered the market and are providing service in competition with incumbent operators in nearly all countries of the European Union. In the past year, companies have committed to investing over $3 billion to build independent intra-European fiber-optic networks.[16] In Japan, Hong Kong, Australia, and many other countries, similar developments are occurring as U.S. and other domestic carriers are entering the market to compete with incumbent carriers.

11. The development of competition in the international market has led the Commission to reexamine its ISP in recent decisions to ensure that it does not have the unintended effect of stifling competition in the U.S. market for international services.[17] The Commission has recognized in several orders in the past three years that the ISP is not necessary on routes where there is competition in the foreign market and may, in fact, impede the further development of competition on such routes.[18] In the 1996 *Policy Statement on International Accounting Rate Reform* (*Policy Statement*), the Commission stated that: "(1) the ISP was designed for a world characterized by bilateral negotiations between carriers with market power; (2) as competitive markets emerge, the ISP could impede competitive behavior and the development of effectively competitive markets; and (3) competitive

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[14] The Commission approves accounting rate changes except where such changes violate the ISP or would result in increased settlement payments for U.S. carriers. *See, e.g., AT&T Corp., Petition for Waiver of the International Settlements Policy*, File No. ISP-97-M-731, Memorandum Opinion and Order, DA 99-1925 (Tel. Div., Int. Bur., rel. Sept. 23, 1998) (rejecting AT&T's proposed accounting rate change for service to Haiti because newly imposed surcharges would result in overall increased settlement rates for U.S. carriers).

[15] The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement." *See Foreign Participation Order*, 12 FCC Rcd 23,891.

[16] *See* FCC International Bureau, *Report on International Telecommunications Markets 1997-1998* (Dec. 7, 1998) (available at http://www.fcc.gov/Bureaus/International/Reports/ritm9798.pdf).

[17] *See Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996) (*Policy Statement*); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996) (*Flexibility Order*); *Foreign Participation Order*, 12 FCC Rcd 23,891; *Notice*, 13 FCC Rcd 15320.

[18] *See Policy Statement*, 11 FCC Rcd 3146.

market forces, where they exist, should determine the supply and pricing of international service."[19]

12. In support of the *Policy Statement*, the Commission adopted policies that allow U.S. carriers, under certain conditions, to enter into arrangements with foreign carriers to route international traffic without adhering to the requirements of the ISP. The Commission's rules currently include two options for U.S. carriers to route traffic outside the requirements of the ISP. The first is international simple resale, or ISR, and the second is the Commission's policy, adopted in the *Flexibility Order*, allowing so-called "alternative settlement arrangements."

13. Under the Commission's ISR rules, authorized carriers may route switched traffic over international private lines interconnected to the public switched network. Such traffic is not subject to the ISP's requirements of nondiscriminatory accounting rates, equal division of accounting rates, or proportionate return of inbound traffic.[20] The Commission reasoned that allowing ISR would promote the public interest in increased competition and reduced prices for international telecommunications services, and that it would also put pressure on above-cost accounting rates.[21] The Commission's ISR rules were originally intended to apply to resellers that leased matching international private line circuits in the U.S. and foreign country, interconnected them to the public switched network on both ends, and offered international voice service to the public.[22] The policy also applies, however, to facilities-based carriers that agree with their foreign correspondents to designate certain circuits as "private lines." Thus, on routes where the Commission allows ISR, facilities-based carriers have a choice of carrying traffic via an ISR arrangement, where they negotiate a rate for the termination of traffic in the foreign market, or of carrying traffic pursuant to a traditional settlement arrangement that is subject to the ISP.

14. The Commission's policy is to encourage the development of ISR as an alternative to the accounting rate system. At the same time, however, the Commission has recognized that ISR poses potential concerns for the U.S. market. Specifically, the Commission is concerned with the potential for "one-way bypass," which could occur if foreign carriers are able to send traffic into the United States at low rates via ISR, but U.S. carriers are not able to send traffic out of the United States over ISR and must instead send traffic over the traditional accounting rate system. We also use this term more broadly to refer to any practice by which a foreign carrier terminates U.S.-inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market. One-way bypass could raise U.S. carriers' settlement costs, and, ultimately consumer prices substantially, if U.S. carriers are forced to pay high settlement rates for outbound traffic but receive little offsetting revenues from inbound traffic routed under an ISR arrangement.

15. To address this potential for one-way bypass, the Commission limits the routes on which U.S. carriers may provide ISR. Under the Commission's current rules, carriers may engage in

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19 *Policy Statement*, 11 FCC Rcd at 3155-56, ¶ 33.

20 *See Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559, 561-562 ¶¶ 17-24 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996).

21 *International Resale Order*, 7 FCC Rcd at 560, ¶ 8.

22 *See generally International Resale Order*, 7 FCC Rcd 559.

ISR on routes to WTO Member countries only where settlement rates for at least 50 percent of the settled, U.S. billed traffic on the route are at or below the appropriate benchmark *or* where the foreign market offers equivalent resale opportunities.[23] For service to non-WTO Member countries, ISR is authorized only where 50 percent of the traffic is settled at benchmark rates *and* where the foreign market offers equivalent resale opportunities. Where equivalent opportunities for ISR exist on the foreign end of a route, there is no concern about one-way bypass because U.S. carriers possess the ability to terminate traffic in the foreign market at non-discriminatory termination rates. In addition, the Commission has reasoned that where settlement rates are relatively low, *e.g.*, at or below the benchmark level, the financial incentive for foreign carriers to engage in one-way bypass is significantly reduced.[24]

16. The second mechanism that allows departure from the ISP is the Commission's flexibility policy. In response to developing competition in foreign markets and the need to increase market pressure to bring international settlement rates closer to cost, in 1996 the Commission adopted a policy to permit alternative settlement arrangements that do not comply with the ISP. The Commission found in the *Flexibility Order* that where there is competition on the foreign end of the international route, the parallel accounting rate and proportionate return requirements of the ISP could limit innovative commercial arrangements and discourage competition.[25] It therefore adopted a procedure to allow settlement arrangements that deviate from the ISP where the foreign market is open to competition.[26] The Commission also stated that it would allow settlement arrangements that deviate

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[23] Originally adopted in 1991, the "equivalency" test was developed to prevent one-way inbound bypass of the settlements system, a practice that would exacerbate the settlements deficit and increase costs to U.S. carriers by reducing the number of U.S.-inbound minutes which are netted from U.S.-outbound minutes for purposes of calculating net settlement payments. *See International Resale Order*, 7 FCC Rcd at 559, 561-562, ¶¶ 17-24. The equivalency test requires applicants to demonstrate that the destination market provides U.S.-based carriers: (1) the legal right to resell international private lines interconnected at both ends for the provision of switched services; (2) nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement; (3) competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and (4) fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services. *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873, 3924-26, ¶¶ 133–138 (*Foreign Carrier Entry Order*). In 1997, the Commission adopted a benchmark settlement rate condition that prohibits U.S. carriers from engaging in ISR unless at least 50 percent of the settled, U.S.-billed traffic on a particular route is settled at or below benchmark settlement rates established by the Commission. *See International Settlement Rates*, IB Docket 96-261, Report and Order, 12 FCC Rcd 19,806, 19,916-21, ¶¶ 242-259 (1997) (*Benchmarks Order*), *Reconsideration pending*, *aff'd sub. nom.*, *Cable & Wireless et al. v. FCC*, No. 97-1612 slip op. (D.C. Cir. Jan. 12, 1999), 1999 WL 7824. In the *Foreign Participation Order*, the Commission removed the equivalency test as a requirement for authorizing ISR for service to WTO Member states, but retained it for authorization of ISR to non-WTO Member countries and countries that do not satisfy the benchmarks condition. *Foreign Participation Order*, 12 FCC Rcd at 23,930-31, ¶ 85.

[24] *Foreign Participation Order*, 12 FCC Rcd at 23,928, ¶ 80.

[25] *See Flexibility Order*, 11 FCC Rcd at 20,070 ¶¶ 18, 19.

[26] Under the standard adopted in the *Flexibility Order* in 1996, parties seeking approval of a flexible settlement arrangement were required to show that the destination market satisfied the effective competitive opportunities (ECO) test, adopted in the *Foreign Carrier Entry Order*. *Flexibility Order*, 11

from the ISP on routes that do not meet the threshold standard for permitting flexibility if the U.S. carrier seeking to enter the arrangement can demonstrate that the arrangement would promote market-oriented pricing and competition while precluding the abuse of market power on the route.[27]

17. We believe the ISR and flexibility policies have been positive initial steps in encouraging increased competition among U.S. carriers and lowering settlement rates on many international routes. These policies allow for deviation from the Commission's restrictive ISP only under certain conditions, however, and their positive impact on the U.S. market for international message telephone service (IMTS) has been limited by these conditions.

18. As the international market for telecommunications services has undergone substantial change in recent years, our polices must change as well. In many cases, application of the ISP is no longer necessary to prevent harm to consumers due to whipsawing by a foreign carrier. Moreover, we find below that where the ISP is unnecessary, its application will actually inhibit competition in the U.S. international services market. We thus adopt below several modifications to our ISP so that it applies only where necessary. We further find in this *Order* that although the flexibility policy has been a useful interim step in the transition from traditional accounting rates to a competitive market, the steps we take in this *Order* largely supersede the flexibility policies. We therefore remove our flexibility policy.

III. Reforming the International Settlements Policy

A. Application of the ISP and related filing requirements to arrangements with foreign carriers that lack market power

19. The Commission proposed in the *Notice* to remove the ISP for all arrangements between U.S. carriers and foreign carriers that lack market power in WTO Member markets. We stated our belief that we should review our international settlements policies to lift unnecessary regulatory burdens in light of significant changes in international telecommunications markets.[28] We sought comment on whether we should continue to maintain the requirement that carriers file contracts and settlement rate information for arrangements with foreign carriers that lack foreign market

FCC Rcd at 20,078-84 ¶¶ 36-51. In 1997, the Commission modified this standard for parties seeking approval of flexible settlement arrangements for service to WTO Member countries. The *Foreign Participation Order* adopted a presumption in favor of flexible settlement arrangements for service to WTO Member countries. The presumption can only be rebutted by a showing that the foreign carrier that is a party to the alternative settlement arrangement is not subject to competition from multiple (more than one) facilities-based competitors providing service in the foreign market that possess the ability to terminate international traffic. *Foreign Participation Order*, 12 FCC Rcd at 24,026-30 ¶¶ 302-313.

[27] The *Flexibility Order* maintains two safeguards for flexible arrangements: (i) alternative arrangements between affiliated carriers and those involved in non-equity joint ventures must be publicly filed with the Commission regardless of the amount of traffic affected; and, (ii) alternative arrangements affecting more than 25 percent of the inbound or outbound traffic on a particular route must also be publicly filed and may not contain unreasonably discriminatory terms and conditions. *See Flexibility Order*, 11 FCC Rcd at 20,078-84 ¶¶ 36-51; *see also Foreign Participation Order*, 12 FCC Rcd at 24,026-30 ¶¶ 302-313.

[28] *Notice*, 13 FCC Rcd at 15,327-30, ¶¶ 18-24.

power.[29] The Commission maintains these filing requirements to ensure that carriers comply with the ISP. Finally, we sought comment on how the Commission and interested parties could confirm that a foreign carrier lacks market power in the foreign market and thus verify that an arrangement with that foreign carrier qualifies for exemption from the ISP.[30]

20. In this *Order*, we remove the ISP for U.S. carriers' settlement agreements with foreign telecommunications carriers that lack market power in WTO Member, as well as non-WTO Member, markets. We also remove the requirement that copies of such agreements and settlement rate information be filed with the Commission.[31] We will publish a list of foreign carriers we believe continue to possess market power and, unless otherwise determined by the Commission, with which U.S. carriers may not enter into arrangements that deviate from the ISP.[32]

1. Removal of the ISP and filing requirements

21. We find that removing the ISP and related filing requirements for arrangements between U.S. carriers and foreign carriers that lack market power in foreign markets would remove unnecessary regulatory burdens on U.S. carriers and at the same time further competition in the U.S. international services market. The vast majority of commenting parties support this change in Commission policy.[33]

22. As we stated in the *Notice*, the Commission adopted the ISP and related filing requirements to prevent whipsawing by a foreign monopoly carrier.[34] Where the carrier in the foreign market lacks market power, however, its ability to whipsaw U.S. carriers is substantially diminished, if not eliminated. Except in unusual circumstances, a U.S. carrier that is faced with an attempt at whipsawing by a foreign carrier that lacks market power on the foreign end of a particular route may respond by entering an agreement with a different foreign carrier on the route. We thus conclude that the ISP is not necessary to prevent whipsawing for settlement arrangements with foreign carriers that lack market power.

23. We further find that removal of the ISP and related filing requirements for settlement

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[29] *Notice*, 13 FCC Rcd at 15,328, ¶ 21.

[30] *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

[31] *See* 47 C.F.R. §§ 43.51, 64.1001.

[32] *See infra*, Section III.B (removing the ISP for arrangements with all foreign carriers on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are 25 percent below the applicable benchmark settlement rate or less). The Commission is releasing a Public Notice, concurrent with the release of this *Order*, containing a list of foreign carriers that do not qualify for a presumption that they lack market power in the foreign telecommunications market. Public Notice, DA 99-809 (rel. May 6, 1999); *see also infra* ¶ 43.

[33] *See, e.g.*, AT&T comments at 4-5; BellSouth comments at 2-3; Qwest comments at 2-3; RSL com comments at 3; *but see* Ameritech comments at 3-4 (arguing that the Commission's proposals go too far because they could allow foreign carriers to gain an unfair advantage over other U.S. carriers).

[34] *See Notice*, 13 FCC Rcd at 15,321-22 ¶¶ 3-4; *see also* 47 C.F.R. § 43.51; *id.* § 64.1001; *see also ISP Order*, 51 Fed. Reg. at 4740, ¶ 3.

arrangements between U.S. carriers and foreign carriers that lack market power will promote competition in the U.S. market. The ISP essentially ensures that U.S. carriers have a unified bargaining position in dealing with a foreign carrier, while our filing requirements ensure transparency. This unified bargaining position and transparency are important where the foreign carrier has the ability unilaterally to set the terms and conditions for terminating traffic in the foreign market. In contrast, where the foreign carrier lacks this ability unilaterally to set the terms and conditions for the termination of international traffic, such a unified bargaining position and transparency on the part of U.S. carriers is not only unnecessary, but could impede competition among U.S. carriers.[35] We therefore find, pursuant to Section 11 of the Act, that the ISP is no longer necessary in the public interest as a result of meaningful economic competition, when it is applied to arrangements between U.S. carriers and foreign carriers that lack market power. As required under Section 11(b), we therefore repeal this rule, as applied in such cases, as it is no longer in the public interest.[36]

24. In the *Notice*, we outlined three ways the ISP may act to inhibit competition among U.S. international carriers.[37] First, the ISP could potentially reduce incentives for U.S. carriers to negotiate low settlement rates by removing any possible differential in rates competing carriers pay for the termination of foreign traffic. Where the rate negotiated by one carrier is available to all other carriers, whether they negotiate or not, the negotiating carrier has a reduced incentive to negotiate aggressively. No matter how aggressively a carrier negotiates, it will be unable to achieve a cost advantage vis-a-vis its competitors under the ISP.

25. Second, the proportionate return requirement of the ISP can distort competition in the U.S. market.[38] Under the proportionate return regime, the volume of outbound and inbound traffic are tied together, with carriers receiving a settlement credit for each additional minute of inbound traffic. This bundling of traffic flows can distort competition. The Commission has found that "the markets for inbound and outbound traffic have different attributes, and a potentially effective entrant in one might be less effective in another."[39] Removing the regulatory link between inbound and outbound traffic markets, thus "should have the ultimate result of producing decentralized, more competitive market structures that improve economic performance and ultimately redound to the benefit of consumers."[40]

26. The proportionate return requirement also is an impediment to new entrants on both ends of the international route where it applies. New entrants in the United States that have little or no U.S. outbound traffic automatically face a higher cost structure than established carriers that have a substantial amount of outbound traffic. That is because, under the proportionate return requirement, U.S. carriers receive return traffic in proportion to the amount of traffic they send outbound. The credits each U.S. carrier receives for return traffic offset the payments it must make for outbound

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35 *See ISP Reconsideration Order*, 2 FCC Rcd at 1118, ¶ 2 (describing the purposes of the ISP to respond to competitive threats posed by foreign monopoly carriers).

36 47 U.S.C. § 11(a)-(b).

37 *Notice*, 13 FCC Rcd at 15,324, ¶¶ 9-11.

38 The proportionate return requirement of the ISP is codified at 47 C.F.R. § 43.51(e).

39 *See Flexibility Order*, 11 FCC Rcd at 20,070, ¶ 19.

40 *See Flexibility Order*, 11 FCC Rcd at 20,070, ¶ 19.

traffic. In most cases, foreign carriers will not start sending a U.S. carrier return traffic until the U.S. carrier's outbound traffic volume reaches a certain threshold. Thus, a new entrant with little outbound traffic would not receive any return traffic to offset the payments it makes for outbound traffic. In addition, U.S. carriers have little incentive to enter into arrangements with foreign new entrants that have little U.S. inbound traffic to offer. If the U.S. carrier terminates traffic with the foreign new entrant, rather than the incumbent (which carries large volumes of U.S. inbound traffic) the U.S. carrier would forgo return traffic it would otherwise receive that would offset the cost of terminating the U.S. outbound traffic.

27. Third, the ISP may inhibit competition at the retail level. Settlement rates are a significant component of the costs of providing international switched services. These rates are made public, and all U.S. carriers pay the same settlement rates to terminate traffic to a specific country. Thus, all carriers have a clear knowledge of a significant component of their competitors' costs. To the extent carriers are aware of their competitors' costs, they are less likely to compete aggressively on price. If the ISP did not exist, and U.S. carriers were each able to enter into independent negotiations for the termination of international traffic without a significant danger of whipsawing by foreign carriers, U.S. carriers' costs would differ, there would be greater uncertainty, and thus greater pressure on U.S. carriers to compete on price, all to the benefit of U.S. consumers.

28. In addition, requiring public availability of the terms and conditions of arrangements between U.S. and foreign carriers may exert a chilling effect on arrangements that might ultimately result in lower costs for particular U.S. carriers. Foreign carriers may be reluctant to enter into arrangements with U.S. carriers to terminate traffic at reduced rates if the U.S. carrier is required to file such arrangements publicly. Indeed, anecdotal information indicates that some carriers are faced with the choice of concluding an arrangement with a foreign carrier at lower rates or complying with the Commission's public filing requirements.

29. For these reasons, we will no longer require U.S. carriers that conclude arrangements with foreign carriers that lack market power in the foreign market to comply with the terms of the ISP or our contract filing requirements. Instead, we find that a policy that promotes the conclusion of unrestricted commercial arrangements between U.S. carriers and foreign carriers that lack market power in the foreign market will best further our goal of promoting competition in the international services market. We find that our Section 43.51 contract filing requirement should no longer apply to any U.S. carrier arrangement with a foreign carrier that lacks market power.[41]

30. We recognize that in certain unusual circumstances a foreign carrier that otherwise would appear to lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market. In such cases, the Commission may be required to take appropriate remedial action. Nevertheless, on balance, we find that the procompetitive benefits of removing the ISP for arrangements with foreign carriers that lack market power far outweigh the potential harm from such arrangements.

31. We believe there still may be a danger that a foreign carrier that possesses market power would have the ability to whipsaw U.S. carriers because such a foreign carrier may unilaterally set the prices, terms and conditions under which U.S. carriers are able to exchange traffic. Where settlement rates are high, U.S. consumers can be injured as a result of increased settlement payments that may result from whipsawing behavior. We thus conclude that application of the ISP to

[41] *See Notice*, 12 FCC Rcd 15,328-29, ¶ 21 (questioning whether there is a strong rationale for maintaining the Commission's filing requirements for arrangements with foreign carriers that lack market power).

arrangements with foreign carriers with market power is necessary unless the potential harm from the exercise of foreign market power is otherwise limited.[42] We therefore will continue to apply the ISP to all arrangements with foreign carriers that possess market power, except as provided below.[43] All carriers entering into arrangements with foreign carriers that possess market power are also required to file copies of contracts with the Commission.[44] Carriers deviating from the ISP for arrangements with dominant carriers that remain subject to the ISP or failing to file with the Commission arrangements with foreign carriers that possess market power are subject to Commission enforcement action.[45]

32. We note that our decision to remove the ISP and our contract filing requirement for arrangements between U.S. carriers and foreign carriers that lack market power is consistent with the application of the Commission's "No Special Concessions" rule. The rule only applies to agreements with foreign carriers that possess market power in the foreign market. Our No Special Concessions rule prohibits U.S. international carriers from "agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier *possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market* . . . ."[46] As the Commission stated in the *Foreign Participation Order*, the No Special Concessions rule is intended to address the concern that an exclusive vertical arrangement between a U.S. carrier and a foreign carrier with market power on the foreign end could result in harm to competition and consumers in the U.S. market.[47] By contrast, the Commission has found it unlikely that an exclusive arrangement between a U.S. carrier and a foreign carrier that lacks market power would result in such harm.[48]

33. The vast majority of commenting parties support our proposal no longer to apply the ISP to arrangements with foreign carriers that lack market power. Ameritech argues, however, that we should maintain the ISP for some arrangements, regardless of whether the foreign carrier possesses

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[42] *See infra*, Section III.B.1.

[43] *See infra* ¶¶ 50-70.

[44] *See* 47 C.F.R. § 43.51.

[45] *See, e.g.*, 47 C.F.R. § 503 (providing for fines up to $100,000 for each day of a continuing violation, not to exceed $1,000,000 for any single act or failure to act in the case of any willful or repeated failure to comply with any rule, regulation, or order issued by the Commission under the Communications Act).

[46] 47 C.F.R. § 63.14(a) (1998) (*emphasis added*). A "special concession" is defined as "an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed carriers and involves:

> "(1) operating agreements for the provision of basic services;
> "(2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or
> "(3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers." 47 C.F.R. § 63.14(b).

[47] *Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-170; *see* 47 C.F.R. 63.14 (1998).

[48] *Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-170.

market power.[49] Ameritech would eliminate the ISP only: "(1) for settlement agreements that affect less than 25 percent of the traffic on a particular route and which are between U.S. carriers and foreign carriers from WTO member countries that permit multiple operator entry to the relevant foreign telecommunications markets; or (2) for routes where transparent, nondiscriminatory, cost-based international termination charges are available on both ends of the route, regardless of whether carriers at either end possess market power."[50]

34. Ameritech would lift the ISP only in cases where there is competition and/or cost-based rates on the foreign end of the international route, regardless of whether the carrier on the foreign end of the international route possesses market power. We agree with Ameritech that cost-based termination rates in foreign markets are a desirable goal. Ameritech's limited proposal to relax the ISP, however, is unlikely to achieve its goal of lowering settlement rates to cost. Ameritech would preclude U.S. carriers from entering into arrangements with foreign carriers that lack market power that deviate from the ISP except under the conditions it outlines above. Precluding such arrangements, or limiting the amount of traffic such arrangements may cover, could require U.S. carriers to pay higher termination rates than might otherwise be the case. Moreover, where the foreign carrier lacks market power, there is no need for such restrictions. Furthermore, Ameritech's proposal would do less to bring about cost-based rates than the policy adopted by the Commission. In addition, Ameritech's proposal would create a cumbersome regulatory framework. Determining whether there are "transparent, nondiscriminatory, cost-based interconnection charges" in the foreign market is likely to require a detailed review of the foreign regulatory regime. Such a review would have similar negative aspects to the effective competitive opportunities analysis we largely abolished in the *Foreign Participation Order*.[51] For these reasons, we decline to adopt Ameritech's proposed standard.

35. In the *Notice*, we proposed to apply our proposal to lift the ISP for arrangements with carriers that lack market power in the foreign market only to arrangements with carriers in WTO Member countries.[52] We received comment from several parties urging us to allow U.S. carriers to exchange traffic outside of the ISP with carriers that lack market power in all foreign markets and not to restrict our relaxation of the ISP only to arrangements with foreign carriers that lack market power in WTO Member countries.[53] AT&T, however, opposes extending any exemption from the ISP to non-WTO markets. AT&T argues that non-WTO markets present greater competitive concerns than WTO markets and that "provision of additional benefits to countries with membership of the WTO" serves the public interest in opening foreign markets. AT&T cites the Commission's decision in the *Foreign Participation Order* to adopt a different standard for entry into the U.S. market by carriers from WTO Members than for carriers from non-WTO Members as support for its position.[54]

36. Although we proposed in the *Notice* to restrict the policies adopted here to WTO

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[49] Ameritech comments at 4.

[50] Ameritech comments at 5.

[51] *Foreign Participation Order*, 12 FCC Rcd at 23,904-17, ¶¶ 30-58.

[52] *Notice*, 13 FCC Rcd at 15,327, ¶ 17.

[53] *See, e.g.*, Teleglobe comments at 2-5; MCI WorldCom comments at 3; Cable & Wireless reply at 3; Star Telecom reply at 2.

[54] AT&T reply at 27 (citing *Foreign Participation Order*, 12 FCC Rcd at 23,944-45, ¶¶ 125-27).

Member country routes only, we find that such a restriction would not serve the public interest. We find, after considering the comments filed, that there are significant potential benefits to lifting the ISP for arrangements with carriers that lack market power in non-WTO Member countries. Where new entrants exist in non-WTO Member countries, the ISP may be a significant impediment to their ability to enter into arrangements with U.S. carriers to terminate U.S. traffic.[55] Commission policy should encourage U.S. carriers to enter into arrangements with such carriers. At the same time, we find that there are few risks associated with allowing U.S. carriers to enter into such arrangements with foreign carriers that lack market power in non-WTO Member markets. As discussed above, the risks of anticompetitive effects from arrangements between U.S. carriers and foreign carriers that lack market power are slight.[56] We therefore will remove the ISP for arrangements with foreign carriers that lack market power in all foreign markets.

37. AT&T advocates distinguishing between WTO Member and non-WTO Member countries for the purpose of applying the ISP to encourage more countries to seek membership in the WTO.[57] We find it unlikely that the opportunity for non-dominant carriers to enter into arrangements with U.S. carriers that need not comply with the ISP would encourage more countries to seek membership in the WTO. The incentive created by such a policy is unlikely to be a strong one because countries introducing competitive telecommunications regimes already have a strong incentive to join the WTO. A policy of requiring all arrangements with carriers from non-WTO Member countries to comply with the ISP may, however, stifle pro-competitive arrangements with new entrants from such countries. We find that the costs of such a policy are not justified by any benefit that may arise due to incentives that might be created for a country to join the WTO. We decline, therefore, to adopt the proposal in the *Notice* to continue to apply the ISP to settlement arrangements with carriers that lack market power from non-WTO Member countries.

2. Market power determination

38. In the *Notice*, we proposed to adopt a presumption that a foreign carrier lacks market power when it possesses less than a 50 percent market share in each of the relevant foreign markets.[58] The Commission adopted this same presumption in the *Foreign Participation Order* for the purpose of determining when to apply competitive safeguards.[59] The Commission found in the *Foreign Participation Order* that the relevant input markets for the purpose of applying our competitive safeguards are the facilities and services markets necessary for provision of U.S. international services. They generally include: international transport facilities or services, including cable landing station

[55] *See supra* ¶ 26.

[56] *See supra* section III.A.1.

[57] AT&T reply at 27.

[58] *Notice*, 13 FCC Rcd at 15,327-28, ¶¶ 18-20.

[59] The Commission does not apply its No Special Concessions rule to arrangements with foreign carriers that lack market power in the relevant foreign markets. The Commission presumes that a carrier lacks market power if it possess less than 50 percent market share in the relevant foreign markets. *See Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-70. Likewise, the Commission will regulate U.S. carriers that are affiliated with foreign carriers as dominant unless the foreign carrier possesses less than 50 percent market share in the relevant foreign markets. *See Foreign Participation Order*, 12 FCC Rcd at 23,869-99, ¶¶ 177-239.

access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end.[60] We find here that the same markets are relevant for determining whether we should continue to apply the ISP, because market power in any of these markets can give a foreign carrier the power to set unilaterally the rates, terms, and conditions of an arrangement to exchange traffic with a U.S. carrier.[61]

39. We find no basis to modify the presumption the Commission adopted in the *Foreign Participation Order* that a carrier that possesses less than 50 percent market share in a foreign market lacks the ability to exercise market power in that market, as some commenting parties request.[62] The Telecommunications Resellers Association (TRA) urges us to presume that foreign carriers that possess less than 25 percent market share in the foreign market lack market power.[63] KDD urges the Commission to allow deviation from the ISP for arrangements with foreign carriers that: i) lack market power in the local exchange market; ii) face competition from multiple facilities-based operators in the foreign market; and iii) are from WTO Member markets.[64]

40. The Commission recognized the importance, in the *Foreign Participation Order*, of adopting a standard that enables carriers "to establish quickly and accurately what international transactions, services, and practices are permissible."[65] The Commission also found, in that *Order*, that a presumption that a carrier with less than 50 percent market share in each of the relevant foreign markets lacks market power is consistent with antitrust legal precedent.[66] Adopting TRA's proposed 25 percent market share threshold is inconsistent with the relevant case law and would require that we impose restrictions on some arrangements that pose little or no risk of competitive harm. As discussed above, we find that applying the ISP in circumstances where it is unnecessary can deter competition.[67]

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60 *See Foreign Participation Order*, 12 FCC Rcd at 23,952-3, ¶ 145; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3917, ¶ 116 ("'Bottleneck services or facilities' are those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end"); *see also*, *The Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15,351, ¶ 43 (rel. Sept. 24, 1997) (*BT/MCI Merger Order*) (identifying six input markets in its merger review: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. inter-city transport; (5) U.K. terminating access services; and (6) U.K. originating access services).

61 We find below, however, that where there are viable alternatives to terminate U.S. traffic in the foreign market and/or the settlement rates available for service to such a market are low, the benefit of removing the ISP for all arrangements, including those with foreign carriers that have market power, outweighs any risk of harm involved. *See infra* ¶¶ 50-65.

62 TRA comments at 4; KDD reply at 4-7.

63 TRA comments at 4.

64 KDD comments at 5-6.

65 *Foreign Participation Order*, 12 FCC Rcd at 23,959, ¶ 160 (quoting comments of U S West).

66 *See Foreign Participation Order*, 12 FCC Rcd 23,959-60 and n. 314, ¶¶ 160-61 (*citing* A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-236 (4th ed.) (1997)).

67 *See supra* ¶¶ 24-27.

We also note that the 50 percent market share screen is merely a presumption that may be rebutted by an interested party.[68]

41. We also decline to adopt the proposal of KDD to find that a carrier lacks market power, for purposes of applying the ISP, where it lacks market power in the local exchange market and faces competition in a WTO Member country. We find that such a standard would be more cumbersome to apply than the one we adopt and would provide less certainty for carriers seeking to determine whether the ISP applies in a given case. Moreover, a presumption by the Commission that a carrier possesses market power in the foreign market based on its market share may be rebutted by an appropriate showing that the carrier nevertheless lacks market power. We thus find that there would be little, if any benefit of substituting KDD's proposed standard for the Commission's existing standard.

3. Procedures to determine whether a carrier qualifies for exemption from the ISP

42. We recognized in the *Notice*, in light of our proposals to remove the requirement that carriers file contracts with the Commission, that it is necessary to adopt a mechanism to ensure that carriers enter into arrangements that deviate from the ISP only with carriers that lack market power in the foreign market, and that our relaxation of the ISP does not enable U.S. carriers to enter into arrangements that deviate from the ISP with foreign carriers that could exercise their market power to the detriment of U.S. consumers.[69] We thus proposed three alternatives to enable the Commission and interested parties to determine whether a particular settlement arrangement must comply with the ISP: (1) require no filing to substantiate the claim that a particular foreign carrier with which a U.S. carrier corresponds lacks market power; (2) require that a carrier identify the route on which it plans to provide service and file a certification that the carrier on the foreign end of the international route lacks market power; or (3) require a carrier to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets or file a petition for declaratory ruling that a foreign carrier with greater than 50 percent market share nevertheless lacks market power.[70]

43. We decline to adopt any of the proposals set forth in the *Notice*. Rather, we adopt the proposal of Cable & Wireless, which asserted that the Commission should make an affirmative finding that carriers possess market power in specific foreign markets, and make a list of such carriers public.[71] Carriers would thus be precluded from exchanging traffic outside of the ISP with carriers on the list unless otherwise allowed.[72] We find that this approach will best advance our policy of allowing U.S. carriers to enter into arrangements with foreign carriers that lack market power with a minimum of regulatory oversight, while maintaining the ISP for certain arrangements with foreign

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68 *Foreign Participation Order*, 12 FCC Rcd 23,959-60 and n. 314, ¶¶ 160-61.

69 *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

70 *Id.*

71 C&W comments at 13-14; *see also* Star Telecom reply at 3.

72 *See infra*, Section III.B.

carriers that possess market power in the foreign market.[73] As discussed above, the Commission's rules include a presumption that a foreign carrier does not possess market power in a foreign market if it possesses less than 50 percent market share in each of the relevant foreign markets.[74] We thus issue, concurrently with the release of this *Order*, a public notice containing a list of foreign carriers that we believe do not qualify for this presumption, for the purposes of identifying arrangements that are not required to comply with the ISP and the Commission's No Special Concessions rule. This list is based on publicly available information, compiled from official sources, including the International Telecommunication Union (ITU). Interested parties may challenge the inclusion or exclusion of any carrier on the list by submitting a petition for declaratory ruling and the appropriate supporting documentation to demonstrate that a carrier included on the list lacks market power or that a carrier excluded from the list has market power. The Commission may also amend the list on its own motion. The list will be updated periodically and posted on the Commission's web page. Carriers are responsible for ensuring that arrangements they enter into outside of the ISP comply with our rules in the event of additions to the list.

44. We find that Cable and Wireless' proposal is the best of the options proposed in the *Notice* or advocated by commenting parties. The first option suggested in the *Notice* was to allow carriers to determine themselves whether a particular foreign carrier lacks market power and require no filing to substantiate such a claim.[75] This option would provide no guidance for the carrier concluding the arrangement and would lack a mechanism for the Commission or other parties to resolve an issue of whether a particular foreign carrier lacks market power. Thus, it would fail to provide certainty to carriers seeking to enter into new arrangements outside of the ISP that such arrangements comply with our rules.

45. The second option proposed in the *Notice* is problematic as well. This option would require that a carrier entering into an arrangement with a foreign carrier that lacks market power make a filing with the Commission that identifies the route and certifies that the foreign carrier lacks market power in all relevant foreign markets.[76] We find that this solution would not provide the carriers concluding the arrangement with sufficient certainty that a particular foreign carrier possesses or lacks market power. This option would depend entirely on the judgement of the carrier entering into the arrangement to determine whether the foreign carrier lacks market power and, unless the certification were public, would provide no mechanism for other interested parties to challenge that judgment. Further, we are concerned that some foreign carriers may be unwilling to enter into procompetitive settlement arrangements with U.S. carriers if their existence could be discerned from publicly available information.

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[73] As discussed below in Section III.B.1, we remove the ISP for all arrangements on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are 25 percent below the applicable benchmark settlement rate or less, including for arrangements with foreign carriers that possess market power.

[74] *See supra* ¶¶ 38-40. The relevant markets include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See Foreign Participation Order*, 12 FCC Rcd at 23,952-3, ¶ 145; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3917, ¶ 116.

[75] *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

[76] *Id.*

46. We also find the third option proposed in the *Notice* to be problematic as well. This option would require a carrier that proposes to enter into an arrangement with a foreign carrier that lacks market power to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets or file a petition for declaratory ruling that a foreign carrier with greater than 50 percent market share nevertheless lacks market power.[77] This option would publicly disclose the existence of an arrangement with a foreign carrier that deviates from the ISP. We find that if the Commission were to adopt such a disclosure requirement some foreign carriers may be unwilling to enter into pro-competitive arrangements with U.S. carriers, thus defeating the purpose of exempting arrangements with foreign non-dominant carriers from the ISP.[78]

47. We also find that other options proposed by commenters are problematic. AT&T supports requiring all parties that seek to enter into an arrangement with a foreign carrier that lacks market power to demonstrate to the Commission, with public notice, that the particular foreign carrier lacks market power. If satisfied, the Commission would then include the foreign carrier on a list of approved foreign carriers that lack market power and with which U.S. carriers may enter into arrangements that deviate from the ISP.[79] Under AT&T's proposal, a U.S. carrier that seeks to enter into an arrangement with a foreign carrier that had not before been found to lack market power by the Commission would have to identify the foreign carrier and demonstrate, subject to notice-and-comment procedures, that the foreign carrier lacks market power. In many cases, a foreign carrier may decline to agree to such an arrangement if the existence of the arrangement would have to be made public. AT&T's proposal could thus inhibit carriers from entering into pro-competitive arrangements. In addition, as commenting parties have suggested, a new prior approval process would "both delay the benefits stemming from the new agreements as well as inhibit the development of emerging U.S. and foreign carriers and the additional competition they bring to the market."[80]

48. AT&T argues that affirmative findings are required to determine whether a foreign carrier possesses market power. Otherwise, it argues, many "ambiguities" requiring resolution will not be raised with the Commission.[81] We find that providing a list of foreign carriers that do not qualify for the Commission's presumption that they lack market power will provide the affirmative finding sought by AT&T and ample opportunities to address any "ambiguities" that may exist with respect to a specific foreign carrier's market power.

49. We will amend Sections 43.51 and 64.1001 to remove the ISP and related contract filing requirements for arrangements between U.S. carriers and foreign carriers that lack market power. Section 43.51 will also specify procedures for modifying the list of foreign carriers that do not qualify for the presumption that they lack market power. We also amend our No Special Concessions Rule, Section 63.14, to eliminate the requirement that a carrier seeking to enter into an exclusive arrangement with a foreign carrier that lacks market power submit with the Section 43.51 contract

[77] *Id.*

[78] We discuss above how public disclosure requirements can put a chilling effect on innovative settlement arrangements. *See supra* ¶ 28.

[79] AT&T reply at 26-27.

[80] Teleglobe comments at 6 (footnote omitted); *see also* SBC reply at 3.

[81] AT&T reply at 26-27.

filing, which we here eliminate, information to demonstrate that the foreign carrier lacks market power.[82] This rule change will permit carriers to rely on the Commission's published list of foreign carriers for purposes of determining which foreign carriers are the subject of the prohibitions contained in Section 63.14.

B. Eliminating the ISP on Selected Routes

1. Eliminating the ISP

50. We sought comment in the *Notice* on whether to remove the ISP completely on selected routes, including for arrangements with foreign carriers that possess market power in the foreign market. We also sought comment on what standard we should use to identify routes where we should no longer apply the ISP. We expressed concern that continued application of the ISP on liberalized routes would impede the development of real competition among U.S. carriers.[83] We suggested several standards and tentatively concluded that we should remove the ISP on all routes that comply with the Commission's ISR standard.[84] We reasoned that where the conditions for allowing ISR are met, there is a significantly reduced threat that U.S. consumers will be injured as a result of allowing U.S. carriers to enter into arrangements with foreign carriers that do not comply with the ISP.[85] We also sought comment in the *Notice* on several alternative proposals for determining whether to apply the ISP on a particular route. These alternatives included, for example, removing the ISP only where the foreign carrier settles U.S. traffic at the 8 cent best practices rate, adopted in the *Benchmarks Order*,[86] and removing the ISP only on routes where traffic is settled at benchmark rates *and* where the foreign market also offers equivalent resale opportunities.[87]

51. The proposal in the *Notice* to remove the ISP on all routes approved under the Commission's ISR standard elicited a wide range of views from commenting parties. In general, most parties favor lifting the ISP completely on certain routes. Differences exist, however, on the standard parties advocate for determining whether a route qualifies for removing the ISP. Many parties support our proposal to lift the ISP on routes that qualify for ISR.[88] Other parties offered alternative standards

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[82] *See supra* ¶ 32.

[83] *Notice*, 13 FCC Rcd at 15,331, ¶ 26.

[84] The Commission allows ISR on routes to World Trade Organization (WTO) Member countries where 50 percent of the settled, U.S. billed traffic is settled at or below benchmark settlement rates established by the Commission, *or* where the foreign market offers equivalent resale opportunities. For service to non-WTO Member countries, ISR is authorized only where 50 percent of the traffic is settled at benchmark rates, *and* where the foreign market offers equivalent resale opportunities. *See supra* ¶ 15.

[85] *Notice*, 13 FCC Rcd at 15,331-32, ¶ 27.

[86] *Benchmarks Order*, 12 FCC Rcd at 19,870-71, ¶¶ 134-135.

[87] *Notice*, 13 FCC Rcd at 15,30-32, ¶¶ 25-31; *see also supra*, note 23 (discussing the Commission's equivalency standard).

[88] *See, e.g.*, BTNA comments at 7-8 (it is superfluous to retain the ISP on ISR routes because carriers are permitted to bypass the ISP by carrying switched traffic over private lines); SBC comments at 8 (where the conditions for allowing ISR are met, the benefits of removing the ISP outweigh the costs of

for relaxing the ISP and opposed the proposal for relaxing the ISP on ISR routes that was set out in the *Notice.*[89] Still other parties urged the Commission to go further and extend the proposal to remove the ISP more widely than proposed in the *Notice.*[90]

52. We conclude that it would serve the public interest to remove the ISP completely on certain routes, including for arrangements with foreign carriers that possess market power in the foreign market. We find that lifting the ISP has significant merits where the potential harm due to a foreign carrier's abuse of market power is limited. We decline, however, to adopt the standard proposed in the *Notice* to remove the ISP on all routes where we allow ISR. Instead, as proposed by MCI WorldCom, we remove the ISP completely only on those routes where U.S. carriers have the ability to settle U.S. traffic at rates that are 25 percent below the benchmark, or less.[91] As discussed below, we believe that the proposal by MCI WorldCom provides the proper balance between, on the one hand, our goal in this proceeding of eliminating regulations that impede the development of competition, and, on the other hand, the longstanding goal of the ISP of preventing anticompetitive behavior that can harm U.S. consumers. We find, in this *Order*, that on those routes where U.S. carriers have the ability to settle U.S. traffic at rates that are 25 percent below the benchmark, or less, the ISP is no longer necessary in the public interest as a result of meaningful economic competition, pursuant to Section 11(a)(2) of the Act. We therefore repeal this rule, as applied in such cases, as it is no longer in the public interest, as required under Section 11(b).[92]

53. We agree with AT&T and MCI WorldCom that the proposal in the *Notice* to remove the ISP on all routes where we allow ISR would not adequately protect U.S. consumers against the harmful effects of the exercise of foreign market power.[93] Under the Commission's ISR standard, ISR is approved on routes where at least 50 percent of the traffic is settled at benchmark rates or below. In some markets, settlement rates will fall to benchmark levels not because of competitive pressures, but because of action by the Commission and U.S. carriers to enforce the benchmark settlement rate

retaining it); Comptel comments at 6-7 (the ISP appears to have no useful purpose on routes where ISR is authorized); Qwest comments at 4-5 (the ISP is essentially superfluous on routes where ISR has been approved, and there is no basis for its retention); *see also* Telia comments at 5; RSL com comments at 3; *but see* AT&T reply at 16-17 (parties supporting the proposal ignore "whipsaw risks" that exist because of margins between benchmark settlement rates and cost).

89 *See, e.g.*, AT&T comments at 9-10 (the ISP only should be lifted where foreign carriers settle at best practices rates or where the "ability to obtain viable ISR arrangements exists"); GSA comments at 6, reply at 3-5 (GSA opposes any move to eliminate the ISP with respect to foreign carriers that possess market power); TRA comments at 5-8; MCI WorldCom comments at 5-6 (the ISP should be lifted only for arrangements with foreign carriers from markets that offer equivalent resale opportunities or where at least 50 percent of traffic is settled within 2 cents of the best practices rate).

90 *See, e.g.*, NTTA.com comments at 10 (The Commission should remove the ISP on all WTO Member routes and rely on GATS dispute resolution and Commission enforcement efforts to deal with any anticompetitive conduct); GTE comments at 9 (GTE supports removing the ISP on all WTO Member routes).

91 Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Robert Koppel and Scott Shefferman, MCI WorldCom (March 16, 1999) *(MCI WorldCom ex parte)*.

92 47 U.S.C. § 11(a)-(b).

93 AT&T comments at 8-9; MCI WorldCom comments at 4-6.